

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 377 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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JAMNADAS MULCHAND (DECD) BY HIS HEIRS

Versus

MANCHHARAM SHOBHRAJMAL

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Appearance:

MR JM PATEL for Petitioners

Respondent served

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CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 26/02/98

ORAL JUDGEMENT

Being aggrieved by the judgment and decree dt. 20th August, 1988, passed by the then learned Assistant Judge at Amreli in Regular Civil Appeal No.30 of 1983, setting aside the judgment and decree so far as the same related to the possessory relief passed by the then learned Civil Judge (S.D.) at Kodinar on 24th January, 1983 in Regular Civil Suit No. 167 of 1980 on his file directing the respondent to hand over peaceful and vacant

possession of the shop and pay the amount of rent of Rs.1,187-50 Ps. along with mesne profit at the rate of Rs.25/- per month till possession is handed over, the original plaintiffs have preferred this revision application.

2. Jamnadas Mulchand was the owner of a shop bearing Census No.A/991 admeasuring 10' x 13'.3" situated in Fulbazaar at Kodinar. That shop (for short the "suit shop") is let to the present respondent at the monthly rent of Rs.25/- from 1st April, 1973. The period of monthly tenancy commences on the 1st day of a month and ends on the last date of a month as per Gregorian calender. The respondent had to pay the rent everymonth regularly but did not pay the rent from 1st July, 1976. He, upto 31st May, 1980, did not pay the amount of rent. He was thus in arrars of rent for a period of more than six months. The shop was let for carrying on the business. For about one year, the respondent carried on his cloth business in the suit shop, and thereafter, he left Kodinar and settled at Gondal, where he is running his business. While leaving Kodinar, he unlawfully sublet the suit shop to Visandas Jethalal and Chijandas Trilokchand for valuable consideration under the guise of partnership. He has thus assigned tenancy interest unlawfully to a third person. Jamnadas Mulchand wanted to run his business in the suit shop. He, for his bonafide requirement, asked the respondent to hand over the possession of the suit shop but the respondent paid no heed to his request. With no option, therefore, he, on 23rd April, 1980, gave a notice terminating the tenancy and calling upon the respondent to pay the amount of rent and hand over the possession. After the service of notice, the respondent neither paid the rent, nor vacated the suit shop. Jamnadas Mulchand was then constrained to file Regular Civil Suit No. 30 of 1983 in the court of the Civil Judge (J.D.) at Kodanar.

3. The respondent, on being served with the summons, appeared before the trial court and filed the written statement at Ex.7 denying each and every allegation levelled against him. The learned trial Judge, therefore, framed necessary issues at Ex.9. Appreciating the evidence on record, the learned trial Judge held that the respondent was the tenant in arrears for more than six months; the notice issued was legal and valid; the case of bonafide requirement was established and Jamnadas would suffer greater hardship, if decree is refused than the respondent, if the decree as prayed for is passed, the respondent was a tenant not ready and willing to pay the rent but found that the case of subletting was not

established. He then, on the grounds of non-payment of rent and bonafide requirement, passed the decree of eviction and also directed the respondent to pay Rs. 1,187-50 Ps. claimed in the suit.

4. Being aggrieved by such judgment and decree, dt.

24th January, 1983, the respondent preferred the appeal bearing Regular Civil Appeal No. 30 of 1983 before the District Court at Amreli. The learned Assistant Judge to whom the appeal was assigned for hearing and disposal in accordance with law, hearing the parties, found that the learned trial Judge had fallen into error in passing the decree of eviction on the above stated two grounds. He, however, found that on the ground of unlawful subletting, Jamnadas was no doubt entitled to the decree of eviction, but as cross objections against the finding qua unlawful subletting of the trial court, were not filed, he was of the view that the decree on that ground could not be passed. He, therefore, allowed the appeal setting aside the judgment and decree passed by the trial court, and dismissed the suit so far as it related to the possessory relief, but confirmed the decree so far as payment of rent was concerned. Being aggrieved by the such decision of the appellate court, the present revision application is preferred by the heirs of Jamnadas Mulchand, the original plaintiff. It may be stated here that during the pendency of the appeal before the District Court at Amreli, Jamnagad Mulchand the original owner of the suit shop died, and therefore, his heirs and legal representatives, the present petitioners before this court were brought on record.

5. The judgment and decree passed by the appellate court are assailed qua the findings on three grounds namely non-payment of rent, bonafide requirement and subletting. At the time of submissions, when a query was made by this court, Mr. Patel, the learned advocate representing the petitioners tapered of his submissions confining to the only ground namely unlawful subletting. I will, therefore, confine to that point alone without dwelling upon the other grounds.

6. It is the case of the petitioner that for the purpose of carrying on the business, the suit shop was let to the present respondent. For sometimes, he carried on his business in the suit shop, but lateron whatever may be the reason, he left Kodinar and went to Gondal and settled there. At the time of leaving Kodinar, he unlawfully sublet the suit shop to Visandas and Chijandas in the year 1977. Against such case, the respondent has come out with the defence that he did not, as alleged,

sublet the suit shop but forming partnership with Visandas and Chijandas, he carried on the business. After passage of time, Visandas died, and Chijandas left. He alone was then running the partnership business. With the result, he alone remained as the tenant and carries on the business. According to him, therefore, he committed no wrong under the Bombay Rent Act, there is in fact no subletting.

7. Before I proceed, it may be stated that the records and proceedings of the trial court were called for and this court could get Files 'A' and 'B' of the records & proceedings. As it was possible to dispose of this revision, the learned advocate representing the petitioner was not keen for File 'C', as according to him, the same has been destroyed by the lower court. No one has appeared on behalf of the respondent, though served.

8. Out of several grounds available to the landlord in Bombay Rent Act, for seeking the decree of eviction, in this case, the ground of unlawful subletting has been resorted to, alleging the aforesaid case. Sec.13(1)(e) of the Bombay Rent Act, which is the relevant provision lays down that if the tenant, after coming into operation of the Bombay Rent Act, unlawfully sublets the whole or part of the premises let to him, or assigns or transfers in any other manner, his interest therein, he can be said to have committed the wrong making him liable to vacate the premises, and entitling the landlord to claim the decree of eviction. Against the case of sub-letting alleged in plaint, the respondent has come forward with the case of partnership. A perusal of Sec.13(1)(e) of the Bombay Rent Act, makes it clear that, if the tenant in the business premises takes partners in the business and runs his business, it will not amount to subletting, which is so made clear by this court in the case of JAGJIVANDAS VANECHAND Vs. DOSHI VANECHAND, 12 G.L.R. 487, but if the landlord assails the case of partnership alleging it to be camouflage, the court has to tear off the mask, closely scrutinize the evidence, and see the real face of the transaction. If it is found that the partnership is genuine, the tenant gets protection and if it is found that the partnership is not genuine, but camouflage or sham certainly, it would be a case of unlawful subletting and the tenant would lose protection.

9. The learned trial Judge, on this ground, has not taken any pains to discuss the evidence on record. He simply rests contented saying that there is neither oral evidence, nor documentary evidence on record throwing

light on the proposition, and holding that the case of sub-letting is not established. The learned Assistant Judge has elaborately dealt with the point to which I agree, and when I am in agreement with his reasonings, and findings, it is not necessary to restate the same. However in short, I would be referring the relevant evidence on record on the point of unlawful subletting. It appears from what has been discussed by the learned Assistant Judge is that the respondent was occupying the shop at Gondal. He was carrying on his business at Gondal. He was never found running the business in the suit shop. This circumstance goes to show that leaving the sole control over the business in the hands of Visandas and Chijandas, and putting them into the possession of the suit shop, the respondent left Kodinar and settled at Gondal. Thereafter, he never took any interest in the business that was carrying on. It also transpires that books of account of the partnership business are not maintained. Ordinarily, when the person carries on the business in the partnership would certainly maintain the books of account so as to determine and share the profit or loss. Here in this case, when according to the respondent, the books of accounts are not maintained, it is also the circumstance which discredits the truth of the defence, he has put forth.

10. According to the respondent, he entered into the partnership on 12th November, 1977, but he preferred to get the partnership deed executed on 13th February, 1978 i.e. about three months after the so called partnership was formed. This may not be the sole circumstance, but an additional circumstance which also discredits the truth of the case in defence. The respondent has also, as per his evidence, no idea what was the yearly turn over of the partnership business, what were the expenses, what was the loss or profit and from which funds, the rent was being paid. The question, whether Visandas or Chijandas was paying the rent is conveniently and shrewdly avoided. The cumulative effect of these circumstances on record is a clear pointer to the fact that there is unlawful subletting under the camouflage partnership. The learned Assistant Judge was, therefore, perfectly right in holding that the respondent has unlawfully sublet the suit shop.

11. Next question that arises for consideration is whether the learned Assistant Judge was right in refusing to pass the decree, although he found that the case of unlawful subletting alleged by the petitioner was clearly established. He refused to pass the decree on the ground

that the cross-objections against the findings of the lower court in that regard were not filed which is certainly erroneous. Order 41 Rule 22, Civil Procedure code is clear on the point. As per that provision, the respondent who has not filed any appeal against any part of the decree or findings, may not only support the decree, but may also submit before the appellate court, if the appeal is filed by the otherside, his case on any issue held against him, submitting that the finding on that issue ought to have been in his favour, because it is not necessary that the party must file the cross-objections. Further as per Order 41, Rule 33 Civil Procedure Code, the appellate court is empowered to pass the decree which, having regard to the materials on record which he thinks it fit to pass on reaching the conclusion that the lower court ought to have passed the decree accordingly. In other words, it is open to the appellate court to pass any decree which ought to have been passed, or the order which ought to have been passed by the lower court, notwithstanding, the appeal is qua the part of the decree or judgment, and the respondent has not filed any appeal or objection qua the findings against him. In view of such clear provision, no decision of the higher court or of this court is necessary. However, suffice it to refer few of such decisions. In the case of MAHANT DHANGIR AND ANOTHER vs. SHRI MADAN MOHAN AND OTHERS, AIR 1988 SC 54, it is laid down that the appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellant court could also pass such other decree or order as the case may require to meet the ends of justice, provided, of course, the parties before the lower court are also before the appellate court. This court had to deal with such question in the case of HUSSENIBHAI ABDULKARIM vs. ABDUL HUSSEIN NAZARALI 1992 (2) G.L.H. 279, wherein, it is laid down taking the support of Dhangir's case (supra) that if the respondent in appeal does not file any cross-objections against the findings given against him by the trial court, it is open to the appellate court to examine the challenge to such findings, even though the cross-objections are not filed. If the appellate court does not entertain the challenge to such finding on the ground that cross-objections were not filed, the same has to be quashed. In view of such law made clear by the above referred two authorities, the then learned Assistant Judge at Amreli, when found that the case of unlawful subletting was established, he ought to have passed the decree of eviction on the ground of unlawful sub-letting, upsetting the findings of the trial court. He, however, misdirected himself and fell into error

under the mistaken impression that he was helpless because cross-objections were not filed. In view of such error of law, it becomes the duty of this court to correct the error of law and pass the decree which in law, the lower appellate court ought to have passed.

12. It appears from the record before me that camouflage partnership was formed on 12th November, 1977 so as to avoid the provisions of Sec.13(1)(e) of the Bombay Rent Act, and frustrate the claim of the landlord to seek the decree of eviction on the ground of unlawful subletting. In fact, the Head-tenant under the guise of the partnership, sublet the suit shop to Shri Visandas till he died. Thereafter, the suit premises were let to Chijandas. During the pendency of the suit, Chijandas left. When the decree was being passed, sub-letting was not surviving. But that development will not protect the tenant from being evicted. In view of Sec.13(1)(e) of the Bombay Rent Act, it is enough for the landlord to satisfy the court that after the Bombay Rent Act came into force, the tenant sublet the suit premises or part thereof unlawfully or assigned his interest to a third one unlawfully. It is not necessary to show that the subtenancy was subsisting pending the suit. If on the date of the suit, unlawful subtenancy is subsisting, and the case of unlawful tenancy is established, it is the ground available to the landlord seeking the decree of eviction, and on the ground being established, a court has to pass the decree, because under the Bombay Rent Act, a wrong which has been done by the tenant, cannot be undone subsequently driving out sub-tenant. Once a wrong is done, the landlord will acquire the right to seek the decree of eviction. In this case, therefore, the petitioners who have acquired the right, because of unlawful subletting, which is clearly established for the aforesaid reasons, have not lost that right because at any time, after the suit was filed, the sub-tenant left the suit premises, and when decree was being passed, there was no sub-tenant in the premises.

13. For the aforesaid reasons, the trial court ought to have passed the decree but fell into error in refusing to pass the decree, dealing with the issue of subletting cursorily. The learned appellate Judge, no doubt, dealt with the point in details and reached the conclusion that unlawful subletting was established, but fell into error in refusing to pass the decree holding that the cross-objections were not filed. The finding of both the courts below being erroneous, are required to be set aside and quashed and on the ground of unlawful subletting, the decree of eviction is required to be

passed.

14. This revision application is, therefore, allowed. The judgment and decree of the lower appellate court, so far as the same relates to possessory relief, are hereby set aside, and the respondent is hereby ordered to hand over peaceful and vacant possession of the suit shop to the petitioners on or before 1st April, 1998. The decree of the trial court directing the respondent to pay Rs.1,187-85 Ps. the amount of rent and mesne profits at the rate of Rs.25/- per month to the petitioners till the possession is handed over, is hereby maintained. Rule accordingly made absolute.

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